



Comptroller General
of the United States

Washington, D.C. 20548

940142

Decision

Matter of: Colonel Larrie C. Bates, USAF Reserve
(Retired) - Excess Compensatory Time - Waiver

File: B-254267

Date: February 14, 1994

DIGEST

1. An Air Force Reserve Colonel, who was employed as a civilian Air Reserve Technician (ART), was granted compensatory time off which caused his pay to exceed the amount authorized by 5 U.S.C. § 5547 (1988) (maximum rate of GS-15), and § 5308 (maximum amount for Level V of the Executive Schedule). This constitutes an erroneous payment. His civilian position was created by a memorandum of understanding between the Air Force and the then Civil Service Commission in 1957, and as such his pay and allowances are subject to the provisions of title 5 of the United States Code the same as other federal employees. See, court cases cited.

2. Air Force Reserve Technician's request for waiver under the provisions of 5 U.S.C. § 5584 (1988), for erroneous payment of compensatory time, may be allowed since there is no indication in the record that he was at fault in the matter.

DECISION

This decision is in response to a request from Department of the Air Force, Headquarters, Air Force District of Washington, for a decision on behalf of Colonel Larrie C. Bates, USAF Reserve (Retired).¹ The Auditor General of the Air Force found that, while employed as an Air Reserve Technician (ART), Colonel Bates used compensatory time in excess of the maximum amount authorized by statute and is now indebted for that amount.

Headquarters, Air Force District of Washington, suggests that Colonel Bates is not indebted to the United States because a specific provision of law pertaining to ARTs, namely 32 U.S.C. § 709(g) (1988), seems to exclude ARTs from

¹The request was sent in by Kenneth W. Stith, Colonel, USAF, Director, AFDWAFO, Bolling Air Force Base, Washington, D.C.

the pay cap. In the alternative, the Air Force requests that Colonel Bates's indebtedness be waived by this Office under the provisions of 5 U.S.C. § 5584 (1988). For the reasons that follow, we find that Colonel Bates is indebted to the United States for excess compensatory time and we grant the request for waiver.

From August 1986 until December 1990, Colonel Bates was the commander of the 459th Military Airlift Wing, Andrews Air Force Base, Maryland, and was also employed as an ART.² As an ART, Colonel Bates was a GS-15 civilian employee of the Air Force Department. Thus, Colonel Bates served in both a civilian and a military capacity and had essentially the same duties for both his military and civilian positions. In his military status he was promoted to Brigadier General with a date of rank of March 1, 1989.

Between 1987 and 1990, General Bates accumulated hundreds of hours of compensatory time which he used (1) to take leave from his civilian status, and (2) earn credit in his military position for the hours he continued to work. Shortly before General Bates's scheduled retirement in December 1990, questions were raised concerning his excessive use of compensatory time. The ensuing investigations found questionable matters concerning General Bates's command of his unit, and he was retired in the rank of Colonel rather than Brigadier General.

The Air Force also determined that Colonel Bates was indebted to the United States in the amount of \$48,800.58 for 1109 hours of unauthorized compensatory time. The basis was that his aggregate rate of pay per pay period exceeded the maximum rate for GS-15 as prescribed by 5 U.S.C. § 5547(a) (1988). The Air Force also states that another provision prohibiting receipt of pay in excess of the basic pay rate for level V of the Executive Schedule in 5 U.S.C. § 5308 (1988), may be applicable.³

²ARTs serve a dual function in that they are federal civilian employees who perform support and maintenance functions for the Air Force and Army and are required, as a condition of employment, to maintain active membership in the reserve unit in which they are serving. David L. Jeffries v. Department of the Air Force, 999 F.2d 529 (Fed. Cir. 1993).

³Although 5 U.S.C. § 5308 was omitted when title 5 was revised by the Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, Nov. 5, 1990, 104 Stat. 1427, it was in effect when Colonel Bates worked overtime.

OPINION

Validity of Debt

The statute referred to by the Air Force, in support of its suggestion that Colonel Bates is not indebted to the United States for the excess use of compensatory time, 32 U.S.C. § 709(g)(2) (1988), states that ARTs shall be granted compensatory time off notwithstanding sections 5542 and 5543 of title 5, or "any other provision of law."

We do not agree with the Air Force that 32 U.S.C. § 709(g)(2) (1988), a provision of the National Guard Technicians Act of 1968, applies in this case. The 1968 Act created a program in which civilian employees performing support functions for the National Guard are required to maintain membership in the National Guard as a condition of employment. The primary purpose of the Act was to convert National Guard Technicians from a status of state employees paid out of federal funds to federal civil servants, in order to provide them with uniform and adequate retirement and fringe benefit programs. See, H.R. Rep. No. 1823, 90th Cong., 2d Sess. 3 (1968), reprinted in 1968 U.S.C.C.A.N. 3318-3333.

While the National Guard ART positions were converted to federal status by the 1968 statute, the Air Force and Army Reserve ART programs had already been established in 1957 and 1960, respectively, by a memorandum of understanding between the agencies involved and the then Civil Service Commission. The Air Force and Army Reserve ARTs were converted to federal government appointments pursuant to 5 U.S.C. § 3301 (1988). As concerns their civilian duties, they were made subject to the same pay and allowances provisions in title 5 of the United States Code that pertain to other federal employees. See, Jeffries v. Department of the Air Force, 999 F.2d 529 (Fed. Cir. 1993); AFGE v. Secretary of the Army, 543 F.2d 930 (D.C. Cir. 1976), cert. denied, 430 U.S. 965 (1977); Thomas v. Department of the Army, 34 M.S.P.R. 678 (1987). No exemption from compensatory time limitations was made for the Air Force and Army Reserve ARTs.

Therefore, the salary limitations contained in 5 U.S.C. §§ 5308, and 5547(a) are applicable in this case. Compensatory time is subject to the aggregate salary limitation contained in 5 U.S.C. § 5547(a) (1988). Edward W. Dorcheus, 58 Comp. Gen. 571 (1979); 37 Comp. Gen. 362 (1957); 26 Comp. Gen. 750 (1947). Under that limitation, employees may be paid premium pay only to the extent that the payment does not cause the employee's aggregate rate of pay for any pay period to exceed the maximum rate for grade GS-15. The maximum rate payable for GS-15 is

limited to level V of the Executive Schedule and it applies to military reserve technicians. Donald Bodine, 60 Comp. Gen. 198 (1981); Military Reserve Technicians Pay, 65 Comp. Gen. 78 (1985). Further, an employee may not be authorized compensatory time off as a result of overtime work if the limitation on aggregate compensation prevented the employee from being paid for such work. Robert E. Brown, B-229089, Dec. 28, 1988.

Accordingly, Colonel Bates as an Air Reserve Technician was overpaid to the extent that his accrual of compensatory time during a pay period caused his salary for that pay period to exceed the maximum rate payable for GS-15, or level V of the Executive Schedule.

Waiver

The Comptroller General is authorized by the provisions of 5 U.S.C. § 5584 (1988), to waive claims of the United States for overpayment of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. Such authority may not be exercised if there is an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim.

There is no indication in the record of fraud, or misrepresentation on the part of Colonel Bates. Nor is there any indication that Colonel Bates was aware of the fact that he was overpaid. The Air Force report recommending waiver states that the only materials sent to ARTs which proscribed the accrual of compensatory time for individuals such as Colonel Bates were not distributed until November 1990, months after he was first questioned about his use of compensatory time. The Air Force states that, prior to the Bates Investigation, Air Force guidance permitted the accrual and use of compensatory time. The record also indicates that Colonel Bates was advised by the then Chief of Civilian Pay that, although he could not be paid cash for overtime, he could take compensatory time off. And when Colonel Bates was advised that he could no longer take compensatory time off, he immediately discontinued such use.

Accordingly, Colonel Bates's request for waiver is hereby granted. See Marion D. Murray, 59 Comp. Gen. 246 (1980).



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